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THE TTAB

Paper No. 14
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Fasteners International, Inc.

Serial No. 75/271,006

Walter D. Ames for Fasteners International, Inc.

Won T. Oh, Trademark Examining Attorney, Law Office 104.

Before Cissel, Hohein and Holtzman, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On April 4, 1997, applicant filed the above-identified application to register the mark "TORKLOC" on the Principal Register for "fasteners, namely, metal screws," in Class 6. The application was based on applicant's claim of use of the mark in connection with the goods in interstate commerce since January 5, 1996.

Registration was refused under Section 2(d) of the Lanham Act on the ground that applicant's mark, as applied to metal screws, so resembles the mark shown below,

which is registered¹ in Class 6, with a disclaimer of "LOK NUT" apart from the mark as shown, for "locknuts," that confusion is likely.

Applicant responded to the refusal of registration with arguments that confusion is unlikely, but the Examining Attorney was not persuaded, and the refusal was made final on February 17, 2000. The Examining Attorney concluded that the mark applicant seeks to register is similar to the registrant's mark and that the goods specified in the application are closely related to those identified in the cited registration. Submitted in support of the final refusal were copies of a number of third-party registrations for goods in Class 6. Each of those registrations lists both locknuts and screws as the goods with which the registrants claim use of their marks.

Applicant timely filed a Notice of Appeal. Applicant filed a brief on appeal, to which the Examining Attorney responded with his brief. Attached to applicant's brief were copies of

¹ Reg. No. 838,241, issued on the Principal Register to Continental Fastener Corp. on Nov. 7, 1967; renewed on November 7, 1987, and now owned by LRG Fastener Corp.

several third-party registrations of marks applicant argued were similar to the cited registered mark and were registered for similar products.

In his brief, the Examining Attorney properly objected to the additional evidence submitted with applicant's brief. Trademark Rule 2.142(d) provides that the record in an appeal closes with the filing of the Notice of Appeal, but that additional evidence may be submitted after that time if the Board grants a request to do so. In the case at hand, applicant did not make such a request, nor does it appear that such a request would have been granted, in that the third-party registrations untimely filed by applicant appear to have been available prior to the filing of the Notice of Appeal. Accordingly, the Board has not considered the evidence submitted with applicant's appeal brief. Even if it were to have been considered, however, it would not have persuaded us to rule in favor of applicant in this appeal.

Applicant did not request an oral hearing before the Board.

In the case of *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set out the factors to be

considered in determining whether confusion is likely. Chief among these factors are the similarity of the marks as to appearance, pronunciation, meaning and commercial impression, and the similarity of the goods as set forth in the application and the registration, respectively.

In the instant case, the record shows that the goods set forth in the application are closely related to the goods listed in the cited registration and the mark applicant seeks to register creates a commercial impression similar to the one engendered by the cited registered mark. Under the circumstances, confusion is likely.

Turning first to consideration of the relatedness of the goods in the registration and the goods identified in the application, we note that the third-party registrations made of record by the Examining Attorney which list both screws and locknuts tend to show that such goods may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); In re Mucky Duck Co., 6 USPQ2d 1467 (TTAB 1988).

As the Examining Attorney points out, applicant's arguments with respect to alleged differences between the trade channels employed by applicant and the owner of the registration are to no avail because, in the absence of restrictions or limitations with respect to channels of

trade or particular types of purchasers in the application and the registration, respectively, we must assume that the goods identified therein move in all the normal channels of trade for such products, and that the goods are promoted and available to all potential customers for those types of products. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). As identified in the application and cited registration, respectively, the goods are locknuts and screws, both of which are fasteners, presumably available through a wide range of trade channels which would include retail hardware stores at which ordinary consumers shop for such items to be used in household projects and repairs. The use of similar marks in connection with both of these kinds of fasteners is plainly likely to cause confusion.

The two marks at issue engender similar commercial impressions because applicant's mark is the phonetic equivalent of the dominant portion of the registered mark. Both marks feature slightly different phonetic spellings of the term "TORQUE LOCK," which could be considered suggestive in connection with the goods of both applicant and the owner of the cited registration.

The issue is not whether there are differences between the two marks that can be precisely articulated, as

applicant has done. Although we must consider the marks in their entireties, it is nonetheless reasonable to consider whether some components of the marks, for one reason or another, have more source-identifying significance than the other components. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976); *In re El Torito Restaurants Inc.*, 90 USPQ2d 2002 (TTAB 1988). Descriptive, disclaimed matter is typically less significant than other components of marks which combine descriptive terminology with other components. The likely recollection of the average purchaser of the respective goods is what must be considered in resolving the issue of likelihood of confusion. *Spoons Restaurants, Inc. v. Morrison, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and *In re Steury Corp.*, 189 USPQ 353 (TTAB 1975). Such a person may not possess perfect recollection, nor will he or she necessarily be confronted by both marks simultaneously so that a side-by-side comparison can be conducted. See: *In re Continental Graphics Corp.*, 52 USPQ 1374 TTAB 1999).

Application of these principles to the facts presented by the instant case leads us to conclude that applicant's mark so resembles the registered mark that confusion is likely when the marks are used on the goods identified in

the application and cited registration, respectively. The word portion of the registered mark, "TORK LOK NUT," is presented inside the cross bar of a "t" design and the mark also includes the word "NUT," which is generic for the goods set forth in the registration. Applicant's mark, "TORKLOC," consists entirely of the phonetic equivalent of "TORK LOK," the dominant element of the registered mark.

Applicant argues that confusion is not likely because registrant disclaimed "LOK NUT" apart from the mark as a whole, which applicant contends leaves us to consider only the "t" design and "TORK," which is suggestive in connection with fasteners like screws and nuts because they must be rotated in order to function. This argument is no more persuasive than the contention that the marks are readily distinguishable because of the differences between "LOK" and "LOC," or that prospective purchasers of applicant's "TORKLOC" screws are not likely to confuse the source of such screws with the source of registrant's "TORK LOK NUT" and design locknuts because the word "NUT" is not likely to be used as part of a mark under which screws are marketed.

Simply put, when we consider the du Pont factors on which we have evidence in this case, we find that confusion is likely because prospective purchasers familiar with

locknuts sold under the registered "TORK LOK NUT" and design mark are likely to assume that screws sold under the "TORKLOC" mark emanate from the same source because the initial parts of each of the marks are phonetic equivalents which both evoke the same suggestive connotation in connection with the goods. Contrary to applicant's contention, its mark would not have to be "TORK LOK SCREW" in order for confusion to be likely, nor does the fact that applicant is aware of no incidents of actual confusion convince us that confusion is not likely in this case. Such evidence is notoriously difficult to obtain, and is not required in order to sustain the Examining Attorney's burden of establishing that confusion is likely. We have no idea of whether there has even been a realistic opportunity for confusion to have occurred. *Cunningham v. Laser Golf Corp.*, 722 F.2d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

The Examining Attorney has demonstrated that confusion is likely in this case because both the goods set forth in the application and those identified in the cited registration can be expected to emanate from the same source, and applicant's mark consists of the phonetic equivalent of a significant portion of the registered mark.

Both marks are not only similar in sound, but they also have the same suggestive significance in connection with the goods in both the application and the registration.

Contrary to applicant's argument, any doubt we might have in resolving the issue of likelihood of confusion within the meaning of Section 2(d) of the Lanham Act must be resolved in favor of the registrant, not the applicant, who, as the second comer, had a duty to select a mark which is not likely to cause confusion with another mark already in use in the marketplace for related products. In *Re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir., 1988).

DECISION: The refusal to register under Section 2(d) the Lanham Act is affirmed.

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